

## **R E M A R K S**

Claims 1 through 24 are in the application, with Claims 1, 10 and 16 being independent.

The pending claims are subject to a restriction requirement. In particular, the Office Action groups the claims into Claims 1 through 9 and 16 through 24 (Group I), and Claims 10 through 15 (Group II). Election of one of these Groups is required because the Groups are alleged to be distinct.

In response to the restriction requirement, Applicants provisionally elect Claims 1 through 9 and 16 through 24. Examination and allowance of the elected claims are respectfully requested.

This provisional election is made with traverse. Applicants request reconsideration of the restriction requirement in light of the following arguments, and pursuant to 37 CFR §1.143. As grounds for traversal, Applicants submit that Groups I and II are not distinct from one another.

Restriction is proper only where an application contains claims directed to two or more independent or distinct inventions. As described in MPEP §806.05(f), the test for determining distinctness of claims directed to a product (i.e., the Group I claims) and to a process (i.e., the Group II claims) includes two prongs, and the claims may be deemed distinct if either prong is satisfied. The Group I and Group II claims were alleged to satisfy the second prong, which states "the product as claimed can be made by another and materially different process". In particular, the Office Action alleges that the device of Claim 2 can be created by a "step of fabricating a separate transistor device oriented in different direction with the memory cell" followed by a "step of fabricating the memory cell".

Applicants submit that the above-mentioned second prong is not satisfied because the proposed method is not materially different from the Group II process claims. For example, Claim 10 does not specify an order in which the memory cell and the transistor are fabricated. In other words, Claim 10 encompasses processes in which the memory cell is fabricated before the transistor as well as processes in which the transistor is fabricated before the memory cell. Even if Claim 10 can only be seen to describe processes in which the memory cell is fabricated before the transistor, which is not conceded, the process suggested by the Examiner cannot be considered a materially different process because it would be an obvious variant of the process of Claim 10.

### CONCLUSION

Applicants therefore request withdrawal of the outstanding restriction requirement and examination of Claims 1 through 24 on the merits. In this regard, Claims 1 through 24 are believed to be in condition for allowance and such action is respectfully requested at the Examiner's earliest convenience.

If there remains any question regarding the present application, or if the Examiner has any suggestions for expediting allowance of the present application, the Examiner is cordially requested to contact the undersigned via telephone at (203) 972-0049.

Respectfully submitted,

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Date



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